

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 122

[EPA-HQ-OW-2011-0188; FRL-9693-5]

RIN 2040-AF22

National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed Rule; Withdrawal.

SUMMARY: On October 21, 2011, the EPA proposed a rulemaking to improve and restore water quality by collecting certain information about concentrated animal feeding operations (CAFOs). The EPA also solicited comments on improving water quality by promoting environmental stewardship and compliance rather than collecting facility-specific information. The EPA is withdrawing the proposal to collect CAFO information by rule. Instead, the EPA, where appropriate, will collect CAFO information using existing sources of information, including state NPDES programs, other regulations, and other programs at the federal, state, and local level. The EPA believes, at this time, it is more appropriate to obtain CAFO information by working with federal, state, and local partners instead of requiring CAFO information to be submitted pursuant to a rule. Today's withdrawal does not preclude the Agency from initiating the same or similar rulemaking at a future date.

ADDRESSES:

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other

material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, D.C. 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding federal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Becky Mitschele, Water Permits Division, Office of Wastewater Management (4203M), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, D.C. 20460; telephone number: (202) 564-6418; fax number: (202) 564-6384; e-mail address: mitschele.becky@epa.gov.

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I. General Information

A. *What Entities Are Potentially Interested in This Final Action?*

Entities potentially interested in this final action include animal feeding operations (AFOs), including AFOs that are CAFOs as defined in the National Pollutant Discharge Elimination System (NPDES) regulations at 40 CFR 122.23(b)(2), pursuant to section 502(14) of the Clean Water Act (CWA). An AFO is a CAFO if it meets the regulatory definition of a Large or Medium CAFO (40 CFR 122.23(b)(4) or (6)) or has been designated as a CAFO (40 CFR 122.23 (c)) by an authorized state or by the EPA. The following table provides the size thresholds for Large, Medium, and Small CAFOs in each animal sector.

Table 1 – SUMMARY OF CAFO SIZE THRESHOLDS FOR ALL SECTORS

Sector	Large	Medium ¹	Small ²
Cattle or cow/calf pairs.....	1,000 or more.....	300–999.....	Less than 300.
Mature dairy cattle.....	700 or more.....	200–699.....	Less than 200.
Veal calves.....	1,000 or more.....	300–999.....	Less than 300.
.....			
Swine (weighing over 55 pounds).....	2,500 or more.....	750–2,499.....	Less than 750.
Swine (weighing less than 55 pounds).....	10,000 or more.....	3,000–9,999.....	Less than 3,000.
Horses.....	500 or more.....	150–499.....	Less than 150.
.....			
Sheep or lambs.....	10,000 or more.....	3,000–9,999	Less than 3,000.
Turkeys.....	55,000 or more.....	16,500–54,999.....	Less than 16,500.
.....			
Laying hens or broilers (liquid manure handling system).	30,000 or more.....	9,000–29,999.....	Less than 9,000.
Chickens other than laying hens (other than a liquid manure handling system).	125,000 or more....	37,500–124,999	Less than 37,500.
Laying hens (other than a liquid manure handling system).	82,000 or more.....	25,000–81,999.....	Less than 25,000.
Ducks (other than a liquid manure handling system).	30,000 or more.....	10,000–29,999	Less than 10,000.
Ducks (liquid manure handling	5,000 or	1,500–	Less than 1,500.

system)

more.....

4,999.....

Notes:

¹ May be designated or must meet one of the following two criteria to be defined as a Medium CAFO: (1) Discharges pollutants through a man-made device; or (2) directly discharges pollutants into waters of the United States which pass over, across, or through the facility or otherwise come into direct contact with the confined animals. 40 CFR 122.23(b)(6).

² Not a CAFO by regulatory definition, but may be designated as a CAFO on a case-by-case basis. 40 CFR 122.23(b)(9).

This table is not intended to be exhaustive. It provides a guide for entities likely to be interested in today's action. If you have questions regarding this action, consult the person listed in the preceding FOR FURTHER INFORMATION CONTACT section.

B. Legal Authority

This action withdraws the proposed NPDES CAFO Reporting Rule. 76 FR 65431, October 21, 2011. Today's final action is issued pursuant to sections 301, 304, 305, 308, 309, 402, 501, and 504 of the CWA (33 U.S.C. 1311, 1314, 1315, 1318, 1319, 1342, 1361, and 1364).

II. Background

A core provision of the CWA is the NPDES permit program which authorizes and regulates the discharge of pollutants from point sources to waters of the United States. 33 U.S.C. 1342. Section 502(14) of the CWA includes "concentrated animal feeding operation" (CAFO) in the definition of "point source." The EPA initially issued national effluent guidelines and standards (ELGs) for feedlots on February 14, 1974, and NPDES CAFO regulations on March 18, 1976. 39 FR 5704, February 14, 1974; 41 FR 11458, March 18, 1976.

In 2008, the EPA issued revised NPDES permitting regulations for CAFOs. 73 FR 70418, November 20, 2008. Subsequently, environmental groups and industry filed petitions for review of the 2008 rule, which were consolidated in the U.S. Court of Appeals for the Fifth Circuit. On May 25, 2010, the EPA signed a settlement agreement with the environmental petitioners in which the EPA committed to propose a rule, pursuant to CWA section 308, 33 U.S.C. 1318, to require all owners or operators of CAFOs to submit certain information to the EPA.

On October 21, 2011, the EPA proposed a rulemaking that contained regulatory options for obtaining specified information from CAFOs to support the EPA in meeting its water quality protection responsibilities under the CWA. The EPA solicited comment on the additional items listed in the settlement agreement that the Agency did not propose to collect. The EPA also requested comment on three alternative approaches to improve water quality including: collecting data from existing sources, requiring states to submit the information to the EPA, and expanding the EPA's network of compliance assistance and outreach tools. The Federal Register notice contains detailed descriptions and a discussion of each option proposed. 76 FR 65431, October 21, 2011.

In the settlement agreement, the EPA committed to take final action on the proposal by July 13, 2012. The settlement agreement does not commit the EPA to any particular final action. The settlement agreement expressly states that nothing in the agreement shall be construed to limit or modify the discretion accorded the EPA by the CWA or by general principles of administrative law. Today's final action fulfills the Agency's commitments per the settlement agreement with the petitioners.

III Summary of Comments Received

The comment period for the proposed rule ended on January 19, 2012, and the EPA received 1,403 comment letters. The commenters on the proposed rule included, among others, states, state associations, industry organizations, environmental advocacy groups, and individuals. The public comments and the EPA's supporting documents are available in Docket EPA-HQ-OW-2011-0188.

Generally, state and state association commenters questioned the need for new regulations in light of states already having the information the EPA was seeking by virtue of existing CAFO programs at the state and local level. Industry commenters opposed the proposed rule arguing, among other things, that much of the data had already been submitted to the states and the EPA and that the information could be collected through means other than a rule. Environmental advocacy groups commented in support of the proposed rule and argued that the EPA should collect more than the five items of information proposed. Individual comments ranged from opposition of the proposed rule to support of the proposed rule. Individuals who opposed the proposal commented that it would be too burdensome for CAFOs to comply with the proposed rule. Individuals who supported the proposal commented that the proposed rule is necessary to implement the CAFO program and that more information than proposed should be collected from CAFOs.

IV. The EPA's Considerations Since Proposal

Since the EPA proposed the rulemaking on October 21, 2011, the EPA conducted a preliminary evaluation of information publicly available on the Internet from all state permitting authorities, expanding on the effort the Agency conducted prior to proposal. Prior to proposal, the EPA evaluated a subset of existing state programs and identified publicly accessible site-specific information for CAFOs. That information informed the EPA's decision to develop the

voluntary state submission process and the alternative approach that relies on existing data sources in the proposed NPDES CAFO Reporting Rule. 76 FR 65437, October 21, 2011. The docket contains examples of CAFO site-specific information that is publicly available on the Internet.

The EPA's post-proposal evaluation of available information included a review of 37 state permitting authority websites to determine if information about CAFOs is accessible online. The EPA notes that although, at present, there are 47 states authorized to implement the NPDES program, a number of those states either have no CAFOs or are not authorized to implement the CAFO portion of the NPDES program. In states where the EPA administers the NPDES program for CAFOs, the EPA has information for CAFOs with NPDES permit coverage from permit applications or notices of intent. The review of the 37 state permitting websites yielded information on 7,473 operations that confine animals. Some of the information includes operations that are not federally defined as CAFOs or operations that are required under state law to have state non-NPDES permits. The EPA compiled these results into a summary report, which can be found in the docket.

In July 2012, the EPA also established a memorandum of understanding (MOU) with the Association of the Clean Water Administrators (ACWA) that specifically will assist the Agency in collecting information about CAFOs. ACWA is an independent, nonpartisan, non-profit corporation of state and interstate water program managers. The EPA believes cooperation with the states will assist the EPA in obtaining needed CAFO information. This collaborative effort between the EPA and ACWA will focus on identifying CAFOs and assist the EPA in obtaining pertinent information about CAFOs on a state-by-state basis.

V. The EPA's Rationale for Withdrawal of the Proposed Rule

In today's final action, the EPA has chosen not to promulgate a regulation. Instead, the EPA is pursuing an approach that relies on a range of existing sources of information, other regulations, and other programs at the federal, state, and local level to gather basic information about CAFOs. The EPA believes at this time it is more appropriate to obtain CAFO information from existing sources. Some states commented that they have the information proposed to be collected by the rule and expressed interest in working with the EPA to exchange that information. Since the EPA has established relationships with states, as well as the U.S. Department of Agriculture (USDA), U.S. Geological Survey (USGS), and other federal partners, the EPA believes that working through existing partnerships will yield timely and useful results in obtaining much of the needed CAFO information. In developing animal agricultural programs since the 2003 CAFO rule, states have longstanding relationships with owners and operators of operations that confine animals. These relationships will facilitate information sharing between relevant stakeholders.

CAFOs play an important role in water quality planning, due to the fact that they are potential sources of nitrogen, phosphorus, pathogens, and other pollutants. The EPA continues to believe that the gathering and evaluating of information about CAFOs can assist local, state, and federal governments, regulated entities, interest groups, and the public in making more informed decisions toward meeting the objective of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). EPA explained how information about CAFOs would assist in implementation of CWA programs in the proposed rule. 76 FR 65436, October 21, 2011. Through the approach outlined in this notice, the EPA will seek to collect CAFO information items listed in the proposed rule, as well

as other information that is available from existing resources, which includes continuing to work with USDA, USGS, and other agencies to address sources of nutrient pollution.

Based on the comments received, the EPA believes that it can obtain much of the desired CAFO information from federal agencies, states, and other existing data sources. The EPA noted in the proposal that the existing NPDES permitting program requires CAFOs with NPDES permit coverage to submit information as part of the application process as well as in annual reports. 76 FR 65439, October 21, 2011. Pursuant to 40 CFR 122.21(i), information on a CAFO permit application must include the following: 1) name of the owner or operator, 2) facility location and mailing address, 3) latitude and longitude of the production area (entrance of the production area), 4) a topographic map of the geographic area in which the CAFO is located showing the specific location of the production area, 5) specific information about the number and type of animals, whether in open confinement or housed under roof, 6) the type of containment and storage and total capacity for manure, litter, or process wastewater, 7) the total number of acres under control of the applicant available for land application of manure, litter, or process wastewater, 8) estimated amounts of manure, litter, and process wastewater generated per year, 9) estimated amounts of manure, litter, and process wastewater transferred to other persons per year, and 10) a nutrient management plan that at a minimum satisfies the requirements specified in 40 CFR 122.42(e), including, for all CAFOs subject to the effluent limitations and standards, the requirements of 40 CFR 412.4(c), as applicable. Also, pursuant to 40 CFR 123.24(b)(3), a memorandum of agreement between State Directors and the Regional Administrators specifies the frequency and content of reports, documents, and other information which the state is required to submit to the EPA. States are required to allow the EPA to routinely review state records, reports, and files relevant to the administration and enforcement

of the approved program. See also 40 CFR 123.41, 40 CFR 123.43. Because these two provisions are part of the NPDES program, the EPA believes, at this time, NPDES authorized states have basic information from the permit application for at least those CAFOs with NPDES permit coverage, and that states will share that information with the EPA. In states where the EPA administers the NPDES program for CAFOs, the EPA has information for CAFOs with NPDES permit coverage from permit applications or notices of intent.

The EPA believes an efficient approach that does not duplicate efforts is the appropriate next step to collecting CAFO information. Thus, the EPA believes that before determining whether to issue a rule requiring CAFOs to submit information, the Agency should obtain existing information from federal agencies, states, local partners, and other resources that already collect data. This decision also recognizes that many CAFOs have provided their information to some governmental entity, although perhaps not to the EPA. While the EPA may not be the entity that received the information initially, it is reasonable at this time for the EPA to work with its federal, state, and local partners to obtain existing information rather than asking CAFOs to re-submit information that they have already submitted to another governmental entity. Collecting existing information, evaluating it, and compiling it in one format will better inform the Agency of what additional information may be needed and the best way to collect that information, if necessary.

Continued implementation of the permitting program for CAFOs likely will result in improvements in data tracking and availability and analysis of CAFO information. For example, some states with established programs have comprehensive data on CAFOs. The EPA described existing data sources in the proposed CAFO Reporting Rule, of which state permitting authorities are just one source. In addition to working with the state permitting authorities to

exchange information mainly on CAFOs with NPDES permit coverage, the EPA may need to use other existing sources of data to obtain information about CAFOs without NPDES permit coverage. The EPA acknowledges some states will have information about CAFOs without NPDES permit coverage through other state programs, such as state operating permits. To fill in information gaps, the Agency may use existing tools, such as site visits and individual information collection requests.

At this time, the EPA has concluded that working with USDA and states, who maintain direct relationships with CAFO owners or operators is an effective approach to obtaining CAFO information that will minimize the burden on states and CAFOs.

VI. Impact Analysis

Because the EPA is not promulgating a regulatory reporting requirement, there are no compliance costs or impacts associated with today's final action.

VII. Statutory and Executive Order Reviews

Today's action does not establish new regulatory requirements. Hence, the requirements of other regulatory statutes and Executive Orders that generally apply to rulemakings (e.g., the Unfunded Mandate Reform Act) do not apply to this action.

National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding
Operation Reporting Rule, Withdrawal

List of Subjects

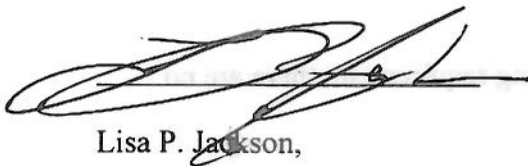
40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 122

Administrative practice and procedure, confidential business information, hazardous
substances, reporting and recordkeeping requirements, water pollution control.

Dated: July 13, 2012



Lisa P. Jackson,

Administrator

Memorandum of Understanding Between the U.S. Environmental Protection Agency and Association of Clean Water Administrators

Collaborative Efforts to Collect and Exchange Information about Concentrated Animal Feeding Operations

Background

On October 21, 2011, the U.S. Environmental Protection Agency (EPA) proposed to improve and restore water quality by collecting information about concentrated animal feeding operations (CAFOs). Because of comments from states regarding the amount of CAFO information they already have, the EPA initiated calls with state permitting authorities to document what information exists at the state level and to collect easily obtainable information from the states.

Purpose of MOU

This Memorandum of Understanding (MOU) is intended to guide the EPA and the Association of Clean Water Administrators (ACWA) in the Agency's effort to collect information about CAFOs. ACWA will foster a dialogue between the EPA and ACWA members to facilitate the exchange of information. This collaborative effort between the EPA and ACWA will focus on identifying CAFOs and obtaining pertinent information about CAFOs on a state by state basis for use by both ACWA members and the EPA. Authority for this MOU comes from Clean Water Act § 104(a) and (b).

Common objectives

- To determine what information about CAFOs exists at the state level, with which state agency such information resides, where that information is stored, and in what format that information is stored;
- To facilitate timely, consistent, and effective exchange of information about CAFOs between states and the EPA, to build state capacity, and promote knowledge transfer; and
- To encourage and promote transparency regarding what information exists about the CAFO universe.

The EPA and ACWA plan to take the following steps to achieve the above listed objectives over 18 months:


- Evaluate and determine how to more effectively collect information about CAFOs;
- Use best efforts to facilitate the collection and transfer of CAFO information currently maintained by states to the EPA; and
- Design and complete a national overview showing how states manage animal feeding operations including whether the state requires permits for animal feeding operations, either under the NPDES program or other state permitting program.

Other provisions

This MOU does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are not party to this agreement, against ACWA or the EPA, their officers or employees, or any other person. This MOU does not direct or apply to any person outside of ACWA and the EPA. The EPA will comply with its Public Information regulations at 40 CFR Part 2 and other statutory and regulatory requirements.

As required by the Antideficiency Act, 31 U.S.C. 1341 and 1342, all commitments made by the EPA in this MOU are subject to the availability of appropriated funds. Nothing in this MOU, in and of itself, obligates the EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations that would be inconsistent with Agency budget priorities. ACWA agrees not to submit a claim for compensation for services rendered to the EPA in connection with any activities it carries out in furtherance of this MOU. However, ACWA may receive reimbursement for eligible and allowable costs under the terms of any financial assistance agreements with the Agency. This MOU does not alter the terms of any financial assistance agreement between the EPA and ACWA. Any transaction involving reimbursement or contribution of funds between the parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.


This MOU is to take effect upon the signature of the parties and remain in effect for a period of 2 years. This MOU may be extended or modified, at any time per the mutual written consent of the parties. Additionally, a party may terminate its participation in this MOU at any time by providing written notice to the other party.



Nancy K. Stoner
Acting Assistant Administrator,
Office of Water,
U.S. Environmental Protection Agency

7/12/12

Date



Alexandra Dapolito Dunn
Executive Director and General Counsel
Association of Clean Water Administrators

Digitally signed by Alexandra Dapolito Dunn
DN: cn=Alexandra Dapolito Dunn,
o=Association of Clean Water Administrators,
ou,email=adunn@acwa-us.org, c=US
Date: 2012.07.12 00:15:04 -0400

Date

Yager, Scott

From: Julie Janovsky [jjanovsky@pewtrusts.org]
Sent: Tuesday, February 19, 2013 1:21 PM
To: Mitschele, Becky; jdevine@nrdc.org; calthouse@nrdc.org; Karen Steuer; Seth Horstmeyer
Cc: Kupchan, Simma; WIEDEMAN, ALLISON; Yager, Scott; Utting, George
Subject: RE: Final Response - Emails - CAFO FOIA

Hi Becky,

A few additional days is ok with Pew and NRDC.

Thanks Becky,

Julie

From: Mitschele, Becky [mailto:Mitschele.Becky@epa.gov]
Sent: Tuesday, February 19, 2013 1:10 PM
To: Julie Janovsky; jdevine@nrdc.org; calthouse@nrdc.org; Karen Steuer
Cc: Kupchan, Simma; WIEDEMAN, ALLISON; Yager, Scott; Utting, George
Subject: Final Response - Emails - CAFO FOIA

Hello Jon and Karen,

May I please have more time (two days) to send you the responsive emails? We transition over the weekend to a new email system and new workplace and is taking a lot of time.

Can I please mail out the CD with the respective emails on Thursday or I can even offer to hand deliver them to the DC offices if that helps to avoid mailing time delays.

Please let me know as soon as possible if this would be OK?

Thanks,

Becky Mitschele
Physical Scientist
US EPA, Office of Wastewater Management
202-564-6418

Yager, Scott

From: Karen Steuer [ksteuer@pewtrusts.org]
Sent: Thursday, April 04, 2013 12:35 PM
To: Mitschele, Becky
Subject: RE: FOIA Interim Response #3 - All Responsive Email Records

Thank you Becky. I received the disk this morning.

Karen Steuer
Deputy Director
Government Relations
The Pew Charitable Trusts
901 E Street NW, Washington D.C.
(202) 887-8818
ksteuer@pewtrusts.org

From: Mitschele, Becky [<mailto:Mitschele.Becky@epa.gov>]
Sent: Thursday, April 04, 2013 12:32 PM
To: Julie Janovsky; jdevine@nrdc.org; calthouse@nrdc.org; Karen Steuer
Cc: Wiedeman, Allison; Yager, Scott; Kupchan, Simma
Subject: FOIA Interim Response #3 - All Responsive Email Records

Hello NRDC and Pew,

Please find attached a letter in response to your FOIA request regarding responsive emails. This letter along with the disk of the records was FedEx yesterday evening. You will have it no later than Friday morning. I will be uploading these documents into FOIAonline as well. If you have any questions, please feel free to call.

Thanks,
Becky Mitschele
US EPA, Office of Wastewater Management
202-564-6418

From: "Althouse, Claire" <calthouse@nrdc.org>
To: <Kupchan.Simma@epamail.epa.gov>; "Devine, Jon" <jdevine@nrdc.org>;
 <jjanovsky@pewtrusts.org>; <ksteuer@pewtrusts.org>
Cc: <Mitschele.Becky@epamail.epa.gov>; <Utting.George@epamail.epa.gov>;
 <Yager.Scott@epamail.epa.gov>; <nkeller@pewtrusts.org>
Sent: Tuesday, January 29, 2013 1:12 PM
Subject: RE: Follow up to FOIA extension response
 Ms. Kupchan,

Thank you for your message regarding NRDC and Pew's FOIA request. We look forward to receiving records responsive to our request for data about individual CAFOs at the end of the week.

We have reviewed your note regarding the agency's email records responsive to our request. Without agreeing that any of the responsive records are privileged, we are willing to deem EPA's production of email records to be complete if the following conditions are met:

1. EPA asks its principal staff involved in developing the reporting rule or its withdrawal if they can recall any emails regarding the reporting rule submitted to EPA by: The American Farm Bureau Federation, The National Pork Producers Council, The National Cattlemen's Beef Association, The United Egg Producers, The U.S. Poultry & Egg Association, The National Council of Farmer Cooperatives, The National Milk Producers Federation, The National Chicken Council, the National Turkey Federation, The National Corn Growers Association, or any other agricultural trade association.
2. EPA asks its principal staff involved in developing the reporting rule or its withdrawal if they can recall any emails exchanged with non-governmental organizations or individuals (such as agricultural industry representatives) or state personnel regarding:
 - The completeness, accuracy, or accessibility of state files, or
 - Individual facilities.
3. If there are emails fitting the description in 1 or 2, above, EPA produces any such emails.

We are willing to extend a reasonable period of time for EPA to gather the above email records.

Sincerely,

Karen Steuer
 Jon Devine

From: Kupchan.Simma@epamail.epa.gov [Kupchan.Simma@epamail.epa.gov]
 Sent: Monday, January 28, 2013 3:47 PM
 To: Althouse, Claire; Devine, Jon; jjanovsky@pewtrusts.org; ksteuer@pewtrusts.org
 Cc: Mitschele.Becky@epamail.epa.gov; Utting.George@epamail.epa.gov;
Yager.Scott@epamail.epa.gov
 Subject: Follow up to FOIA extension response

Dear Ms. Althouse, Mr. Devine, Ms. Janovsky, and Ms. Steuer,

Thank you for considering our request for an extension to provide the documents responsive to your FOIA request.. In our interim response dated December 18, 2012, we provided you with copies of the documents that respond to items I(1) and (2) in your request, and we will supplement those with all records that respond to item I(3) by this Thursday, Jan. 31, 2013. To be clear, that supplemental response will include all data we received from states related to their CAFO information.

I am writing to address two other types of records that your request seeks – all records related to the withdrawal of the proposed CAFO Reporting Rule and email records related to request I(2). When we spoke on the phone, we focused on the timing of transmission of the information that we view of value, i.e., information about individual CAFOs, that we neglected to focus on these two types of records. We therefore failed to explain the practical difficulties of providing this information by the current deadline. We apologize for this oversight.

We hope find out whether you are seeking any information in this broad introductory paragraph that you would not receive in our responses to the specific items #1,2, and 3 listed below it. All of the releasable documents responsive to this request are already available in the docket -- any other documents are deliberative and possibly attorney client privileged. Nonsubstantive emails or meeting requests may also be responsive to this request and releasable. Substantive emails, aside from those containing materials you have already received, would largely be privileged as deliberative.

We cannot think of any useful information that an index of deliberative documents and a small number of emails would provide to you. This request would, however, require a search of scores of Agency email accounts, including those of senior managers who have retired and staff members who have moved on, and yield tens of thousands of emails that would require review. The overwhelming majority of this burden would fall on our CAFO Reporting Rule staff person, Becky Mitschele, who is also the person conducting the CAFO information collection with states and compilation project. Based on discussions with other FOIA responders, she currently estimates that rounding up and processing all of these emails would take approximately three weeks of full time effort.

The second category of records that your request seeks, which we have not yet produced and would also consume significant Agency resources, is emails and a log of privileged records relating to factual information concerning the completeness, accuracy, and public accessibility of states' CAFO information in certain specified areas (item I(2)). Fewer people have been involved in discussions on this subject, so providing emails and a privilege log in response to this item would be less burdensome than responding to the introductory paragraph discussed above. Yet providing emails and a log of privileged documents in response to this item would still entail a significant burden.

We wanted to make sure that you felt that the resources these responses would consume here at EPA were warranted. Again, we are not sure how the information we would release, that we have not already released, will benefit you.

We are hopeful that the materials we have provided, and that we intend to provide by the end of the week, will convey all that you think you need to know, and that you might deem our providing of all documents in response to items I(1), (2), and (3) sufficient to satisfy the purpose of your FOIA request. If you do think that emails and a privilege log responsive to the introductory paragraph and item I(2) are still necessary, we respectfully request an extension of three weeks in which to provide you with this information. It would not be possible for us to provide you with this information by the current deadline of January 31, 2013.

I personally apologize for failing to have raised these issues sooner, on our earlier call.

I hope that the fact that you will be receiving what we all believe are the documents most important to you by the end of this week will incline you to acknowledge our practical concerns with the FOIA response.

Thank you for your attention. We would be grateful if you could respond as soon as possible.

Simma A. Kupchan
Water Law Office
EPA Office of General Counsel
Ariel Rios North, Room 7313A
(202) 564-3105

From: "Althouse, Claire" <calthouse@nrdc.org>

To: Becky Mitschele/DC/USEPA/US@EPA

Cc: "Devine, Jon" <jdevine@nrdc.org>, Julie Janovsky <jjanovsky@pewtrusts.org>, "ksteuer@pewtrusts.org" <ksteuer@pewtrusts.org>

Date: 01/25/2013 11:41 AM

Subject: FOIA: Pew and NRDC response

Dear Ms. Mitschele,

Attached please find Pew and NRDC's response to your Jan. 10, 2013, request for additional time to respond to our FOIA request.

Sincerely,
Claire Althouse

--

Claire Althouse
Policy Analyst • Water Program
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401
T: (310) 434-2300
F: (310) 434-2399

P Please consider the environment before printing this email.

(See attached file: PewNRDC Response to request for more time 1-25-13.pdf)

Yager, Scott

From: Althouse, Claire [calthouse@nrdc.org]
Sent: Tuesday, January 29, 2013 1:12 PM
To: Kupchan, Simma; Devine, Jon; jjanovsky@pewtrusts.org; ksteuer@pewtrusts.org
Cc: Mitschele, Becky; Utting, George; Yager, Scott; nkeller@pewtrusts.org
Subject: RE: Follow up to FOIA extension response

Ms. Kupchan,

Thank you for your message regarding NRDC and Pew's FOIA request. We look forward to receiving records responsive to our request for data about individual CAFOs at the end of the week.

We have reviewed your note regarding the agency's email records responsive to our request. Without agreeing that any of the responsive records are privileged, we are willing to deem EPA's production of email records to be complete if the following conditions are met:

1. EPA asks its principal staff involved in developing the reporting rule or its withdrawal if they can recall any emails regarding the reporting rule submitted to EPA by: The American Farm Bureau Federation, The National Pork Producers Council, The National Cattlemen's Beef Association, The United Egg Producers, The U.S. Poultry & Egg Association, The National Council of Farmer Cooperatives, The National Milk Producers Federation, The National Chicken Council, the National Turkey Federation, The National Corn Growers Association, or any other agricultural trade association.
2. EPA asks its principal staff involved in developing the reporting rule or its withdrawal if they can recall any emails exchanged with non-governmental organizations or individuals (such as agricultural industry representatives) or state personnel regarding:
 - The completeness, accuracy, or accessibility of state files, or
 - Individual facilities.
3. If there are emails fitting the description in 1 or 2, above, EPA produces any such emails.

We are willing to extend a reasonable period of time for EPA to gather the above email records.

Sincerely,

Karen Steuer
Jon Devine

From: Kupchan.Simma@epamail.epa.gov [Kupchan.Simma@epamail.epa.gov]
Sent: Monday, January 28, 2013 3:47 PM
To: Althouse, Claire; Devine, Jon; jjanovsky@pewtrusts.org; ksteuer@pewtrusts.org
Cc: Mitschele.Becky@epamail.epa.gov; Utting.George@epamail.epa.gov; Yager.Scott@epamail.epa.gov
Subject: Follow up to FOIA extension response

Dear Ms. Althouse, Mr. Devine, Ms. Janovsky, and Ms. Steuer,

Thank you for considering our request for an extension to provide the documents responsive to your FOIA request.. In our interim response dated December 18, 2012, we provided you with copies of the documents that respond to items I(1) and (2) in your request, and we will supplement those with all records that respond to item I(3) by this Thursday, Jan. 31, 2013. To be clear, that supplemental response will include all data we received from states related to their CAFO information.

I am writing to address two other types of records that your request seeks – all records related to the withdrawal of the proposed CAFO Reporting Rule and email records related to request I(2). When we spoke on the phone, we focused on

the timing of transmission of the information that we view of value, i.e., information about individual CAFOs, that we neglected to focus on these two types of records. We therefore failed to explain the practical difficulties of providing this information by the current deadline. We apologize for this oversight.

We hope find out whether you are seeking any information in this broad introductory paragraph that you would not receive in our responses to the specific items #1,2, and 3 listed below it. All of the releasable documents responsive to this request are already available in the docket -- any other documents are deliberative and possibly attorney client privileged. Nonsubstantive emails or meeting requests may also be responsive to this request and releasable. Substantive emails, aside from those containing materials you have already received, would largely be privileged as deliberative.

We cannot think of any useful information that an index of deliberative documents and a small number of emails would provide to you. This request would, however, require a search of scores of Agency email accounts, including those of senior managers who have retired and staff members who have moved on, and yield tens of thousands of emails that would require review. The overwhelming majority of this burden would fall on our CAFO Reporting Rule staff person, Becky Mitschele, who is also the person conducting the CAFO information collection with states and compilation project. Based on discussions with other FOIA responders, she currently estimates that rounding up and processing all of these emails would take approximately three weeks of full time effort.

The second category of records that your request seeks, which we have not yet produced and would also consume significant Agency resources, is emails and a log of privileged records relating to factual information concerning the completeness, accuracy, and public accessibility of states' CAFO information in certain specified areas (item I(2)). Fewer people have been involved in discussions on this subject, so providing emails and a privilege log in response to this item would be less burdensome than responding to the introductory paragraph discussed above. Yet providing emails and a log of privileged documents in response to this item would still entail a significant burden.

We wanted to make sure that you felt that the resources these responses would consume here at EPA were warranted. Again, we are not sure how the information we would release, that we have not already released, will benefit you.

We are hopeful that the materials we have provided, and that we intend to provide by the end of the week, will convey all that you think you need to know, and that you might deem our providing of all documents in response to items I(1), (2), and (3) sufficient to satisfy the purpose of your FOIA request. If you do think that emails and a privilege log responsive to the introductory paragraph and item I(2) are still necessary, we respectfully request an extension of three weeks in which to provide you with this information. It would not be possible for us to provide you with this information by the current deadline of January 31, 2013.

I personally apologize for failing to have raised these issues sooner, on our earlier call.

I hope that the fact that you will be receiving what we all believe are the documents most important to you by the end of this week will incline you to acknowledge our practical concerns with the FOIA response.

Thank you for your attention. We would be grateful if you could respond as soon as possible.

Simma A. Kupchan
Water Law Office
EPA Office of General Counsel
Ariel Rios North, Room 7313A
(202) 564-3105

From: "Althouse, Claire" <calthouse@nrdc.org>

To: Becky Mitschele/DC/USEPA/US@EPA

Cc: "Devine, Jon" <jdevine@nrdc.org>, Julie Janovsky <jjanovsky@pewtrusts.org>, "ksteuer@pewtrusts.org" <ksteuer@pewtrusts.org>
Date: 01/25/2013 11:41 AM
Subject: FOIA: Pew and NRDC response

Dear Ms. Mitschele,

Attached please find Pew and NRDC's response to your Jan. 10, 2013, request for additional time to respond to our FOIA request.

Sincerely,
Claire Althouse

--

Claire Althouse
Policy Analyst • Water Program
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401
T: (310) 434-2300
F: (310) 434-2399
P Please consider the environment before printing this email.

(See attached file: PewNRDC Response to request for more time 1-25-13.pdf)

From: "Karen Steuer" <ksteuer@pewtrusts.org>
To: <Mitschele.Becky@epamail.epa.gov>; "Devine, Jon" <jdevine@nrdc.org>
Sent: Monday, December 31, 2012 9:59 AM
Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA
Hi Becky,

Thanks for getting back to us so quickly. I'm available after 5 on 1/3, and all afternoon on the 7th.

Karen

Karen Steuer

Director, Government Relations
Pew Environment Group
901 E St. NW
Washington, D.C. 20005
(202)887-8818

From: Mitschele.Becky@epamail.epa.gov [Mitschele.Becky@epamail.epa.gov]
Sent: Friday, December 28, 2012 1:42 PM
To: Devine, Jon; Karen Steuer
Subject: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Jon and Karen,

I would like to set up another quick conference call to discuss the CAFO FOIA. In addition to myself and George Utting, Rural Branch Acting Chief, Deborah Nagle, our Division Director, will be on the call. We would like to discuss the site-specific CAFO records on this call.

Is there a good time that works for both of you? Deborah currently has open the following times:

1/2/13 after 3 pm EST
1/3/13 After 5 pm
1/7 or 1/9 after 3 pm

Thanks,
Becky Mitschele
Water Permits Division, OWM
U.S. Environmental Protection Agency
Tel: 202.564.6418

From: <Mitschele.Becky@epamail.epa.gov>
To: "Karen Steuer" <ksteuer@pewtrusts.org>
Cc: "Devine, Jon" <jdevine@nrdc.org>
Sent: Monday, December 31, 2012 10:08 AM
Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

To: Karen Steuer <ksteuer@pewtrusts.org>
 Cc: "Devine, Jon" <jdevine@nrdc.org>

Thanks, Karen!

I don't think Jon is in until the 2nd so I will check with him then to see if one of those times also works for him.

Happy New Year!

Becky Mitschele
 Water Permits Division, OWM
 U.S. Environmental Protection Agency
 Tel: 202.564.6418

▼ Karen Steuer ---12/31/2012 10:01:12 AM---Hi Becky, Thanks for getting back to us so quickly. I'm available after 5 on 1/3, and all afternoon

From: Karen Steuer <ksteuer@pewtrusts.org>
 To: Becky Mitschele/DC/USEPA/US@EPA, "Devine, Jon" <jdevine@nrdc.org>
 Date: 12/31/2012 10:01 AM
 Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Becky,

Thanks for getting back to us so quickly. I'm available after 5 on 1/3, and all afternoon on the 7th.

Karen

Karen Steuer

Director, Government Relations
 Pew Environment Group
 901 E St. NW
 Washington, D.C. 20005
 (202)887-8818

From: Mitschele.Becky@epamail.epa.gov [Mitschele.Becky@epamail.epa.gov]
Sent: Friday, December 28, 2012 1:42 PM
To: Devine, Jon; Karen Steuer
Subject: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Jon and Karen,

I would like to set up another quick conference call to discuss the CAFO FOIA. In addition to myself and George Utting, Rural Branch Acting Chief, Deborah Nagle, our Division Director, will be on the call. We would like to discuss the site-specific CAFO records on this call.

Is there a good time that works for both of you? Deborah currently has open the following times:

1/2/13 after 3 pm EST
1/3/13 After 5 pm
1/7 or 1/9 after 3 pm

Thanks,
Becky Mitschele
Water Permits Division, OWM
U.S. Environmental Protection Agency
Tel: 202.564.6418

I don't know Jon is in until the 2nd and I will check with him then to see if one of those times also works for him.

Happy New Year!

Becky Mitschele
Water Permits Division, OWM
U.S. Environmental Protection Agency
Tel: 202.564.6418

Karen Stuehr --- 1/2/13 10:01 AM --- Hi Becky. Thanks for getting back to us so quickly. I'm available after 3 on 1/2 and all afternoon.

From: Karen Stuehr [mailto:kstuehr@epa.gov]
To: Becky Mitschele [mailto:bmitschele@epa.gov]
Sent: Friday, December 28, 2012 1:42 PM
Subject: Meeting requested to discuss 12/29 letter in response to CAFO FOIA

Hi Jon and Karen,

I would like to set up another quick conference call to discuss the CAFO FOIA. In addition to myself and George, I'm also including Deborah, our Division Director, on the call. We would like to discuss the site-specific CAFO records on this call.

Subject: Meeting requested to discuss 12/29 letter in response to CAFO FOIA
To: Deborah, Jon; Karen Stuehr
Sent: Friday, December 28, 2012 1:42 PM
From: Mitschele, Becky [mailto:bmitschele@epa.gov]

1203 8818
Washington, D.C. 20005
901 E. St. NW
New Environment Group
Director, Government Relations
Karen Stuehr

From: "Karen Steuer" <ksteuer@pewtrusts.org>
To: <Mitschele.Becky@epamail.epa.gov>; "James, Carol" <cjames@nrdc.org>
Sent: Monday, January 07, 2013 3:10 PM
Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA
 Thanks Becky – sorry for the delay in responding.

Yes, I can make it at 5:00 on the 10th.

Karen

From: Mitschele.Becky@epamail.epa.gov [mailto:Mitschele.Becky@epamail.epa.gov]
Sent: Monday, January 07, 2013 11:19 AM
To: James, Carol; Karen Steuer
Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Thanks so much, Carol! I need to make sure this works for Karen at Pew. If so, I will send out the meeting invite.

Karen, does this time (1/10, Thursday, 5 to 6 pm) work for you?

Thanks again!
 Becky Mitschele
 Water Permits Division, OWM
 U.S. Environmental Protection Agency
 Tel: 202.564.6418

▼ "James, Carol" ---01/07/2013 11:14:49 AM---Hi Becky - Both Jon and Claire can do this Thursday, January 10, 5:00pm-6:00pm Eastern Time. Let's

From: "James, Carol" <cjames@nrdc.org>
To: Becky Mitschele/DC/USEPA/US@EPA
Date: 01/07/2013 11:14 AM
Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Becky – Both Jon and Claire can do this Thursday, January 10, 5:00pm-6:00pm Eastern Time. Let's go with that. Will you be following up with a meeting request?

Thanks.

Carol

From: Mitschele.Becky@epamail.epa.gov [mailto:Mitschele.Becky@epamail.epa.gov]
Sent: Monday, January 07, 2013 9:51 AM
To: James, Carol
Cc: Devine, Jon; Karen Steuer; Althouse, Claire
Subject: Fw: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Carol,

Thanks for helping me out with setting something up with Jon and Claire at NRDC to discuss the 12/20 letter in

response to the CAFO FOIA.

I previously heard back from Karen with options, but I don't think that NRDC could meet this afternoon so let's try to set something up a bit later in the month. Deborah is open the following times:

1/8 from 5 to 6 pm EST
 1/10 from 5 pm to 6 pm EST
 1/22 from 10 am to 11 am; 2 to 3 pm, or anywhere from 4 to 6 pm.

Could you give me some options so that I can make sure that Karen is available as well since she was not on the first call?

We would like an hour; however, because there are multiple people's schedules, if we have only a 30 min block, we can still have a productive but short call.

Thanks for your help!

Thanks,
 Becky Mitschele
 Water Permits Division, OWM
 U.S. Environmental Protection Agency
 Tel: 202.564.6418

----- Forwarded by Becky Mitschele/DC/USEPA/US on 01/07/2013 09:44 AM -----

From: Becky Mitschele/DC/USEPA/US
 To: Karen Steuer <ksteuer@pewtrusts.org>
 Cc: "Devine, Jon" <jdevine@nrdc.org>
 Date: 12/31/2012 10:08 AM
 Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Thanks, Karen!

I don't think Jon is in until the 2nd so I will check with him then to see if one of those times also works for him.

Happy New Year!

Becky Mitschele
 Water Permits Division, OWM
 U.S. Environmental Protection Agency
 Tel: 202.564.6418

▼ Karen Steuer ---12/31/2012 10:01:12 AM---Hi Becky, Thanks for getting back to us so quickly. I'm available after 5 on 1/3, and all afternoon

From: Karen Steuer <ksteuer@pewtrusts.org>
 To: Becky Mitschele/DC/USEPA/US@EPA, "Devine, Jon" <jdevine@nrdc.org>
 Date: 12/31/2012 10:01 AM
 Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Becky,

Thanks for getting back to us so quickly. I'm available after 5 on 1/3, and all afternoon on the 7th.

Karen

1/9/2014

Karen Steuer

Director, Government Relations
Pew Environment Group
901 E St. NW
Washington, D.C. 20005
(202)887-8818

From: Mitschele.Becky@epamail.epa.gov [Mitschele.Becky@epamail.epa.gov]

Sent: Friday, December 28, 2012 1:42 PM

To: Devine, Jon; Karen Steuer

Subject: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Jon and Karen,

I would like to set up another quick conference call to discuss the CAFO FOIA. In addition to myself and George Utting, Rural Branch Acting Chief, Deborah Nagle, our Division Director, will be on the call. We would like to discuss the site-specific CAFO records on this call.

Is there a good time that works for both of you? Deborah currently has open the following times:

1/2/13 after 3 pm EST

1/3/13 After 5 pm

1/7 or 1/9 after 3 pm

Thanks,
Becky Mitschele
Water Permits Division, OWM
U.S. Environmental Protection Agency
Tel: 202.564.6418

From: <Mitschele.Beky@epamail.epa.gov>
To: "Karen Steuer" <ksteuer@pewtrusts.org>
Cc: "James, Carol" <cjames@nrdc.org>
Sent: Monday, January 07, 2013 3:11 PM
Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

To: Karen Steuer <ksteuer@pewtrusts.org>
 Cc: "James, Carol" <cjames@nrdc.org>

Thanks!! I will send out the meeting invite shortly then.

Becky Mitschele
 Water Permits Division, OWM
 U.S. Environmental Protection Agency
 Tel: 202.564.6418

▼ Karen Steuer ---01/07/2013 03:10:40 PM---Thanks Becky â€" sorry for the delay in responding. Yes, I can make it at 5:00 on the 10th.

From: Karen Steuer <ksteuer@pewtrusts.org>
 To: Becky Mitschele/DC/USEPA/US@EPA, "James, Carol" <cjames@nrdc.org>
 Date: 01/07/2013 03:10 PM
 Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Thanks Becky â€" sorry for the delay in responding.

Yes, I can make it at 5:00 on the 10th.

Karen

From: Mitschele.Beky@epamail.epa.gov [<mailto:Mitschele.Beky@epamail.epa.gov>]
Sent: Monday, January 07, 2013 11:19 AM
To: James, Carol; Karen Steuer
Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Thanks so much, Carol! I need to make sure this works for Karen at Pew. If so, I will send out the meeting invite.

Karen, does this time (1/10, Thursday, 5 to 6 pm) work for you?

Thanks again!
 Becky Mitschele
 Water Permits Division, OWM
 U.S. Environmental Protection Agency
 Tel: 202.564.6418

▼ "James, Carol" ---01/07/2013 11:14:49 AM---Hi Becky - Both Jon and Claire can do this Thursday, January 10, 5:00pm-6:00pm Eastern Time. Let's

From: "James, Carol" <cjames@nrdc.org>
 To: Becky Mitschele/DC/USEPA/US@EPA
 Date: 01/07/2013 11:14 AM
 Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Becky – Both Jon and Claire can do this Thursday, January 10, 5:00pm-6:00pm Eastern Time. Let's go with that. Will you be following up with a meeting request?

Thanks.

Carol

From: Mitschele.Becky@epamail.epa.gov [mailto:Mitschele.Becky@epamail.epa.gov]

Sent: Monday, January 07, 2013 9:51 AM

To: James, Carol

Cc: Devine, Jon; Karen Steuer; Althouse, Claire

Subject: Fw: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Carol,

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I previously heard back from Karen with options, but I don't think that NRDC could meet this afternoon so let's try to set something up a bit later in the month. Deborah is open the following times:

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We would like an hour; however, because there are multiple people's schedules, if we have only a 30 min block, we can still have a productive but short call.

Thanks for your help!

Thanks,

Becky Mitschele

Water Permits Division, OWM

U.S. Environmental Protection Agency

Tel: 202.564.6418

----- Forwarded by Becky Mitschele/DC/USEPA/US on 01/07/2013 09:44 AM -----

From: Becky Mitschele/DC/USEPA/US

To: Karen Steuer <ksteuer@pewtrusts.org>

Cc: "Devine, Jon" <jdevine@nrdc.org>

Date: 12/31/2012 10:08 AM

Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Thanks, Karen!

I don't think Jon is in until the 2nd so I will check with him then to see if one of those times also works for him.

Happy New Year!

Becky Mitschele

Water Permits Division, OWM
U.S. Environmental Protection Agency
Tel: 202.564.6418

Karen Steuer ---12/31/2012 10:01:12 AM---Hi Becky, Thanks for getting back to us so quickly. I'm available after 5 on 1/3, and all afternoon

From: Karen Steuer <ksteuer@pewtrusts.org>
To: Becky Mitschele/DC/USEPA/US@EPA, "Devine, Jon" <jdevine@nrdc.org>
Date: 12/31/2012 10:01 AM
Subject: RE: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Becky,

Thanks for getting back to us so quickly. I'm available after 5 on 1/3, and all afternoon on the 7th.

Karen

Karen Steuer

Director, Government Relations
Pew Environment Group
901 E St. NW
Washington, D.C. 20005
(202)887-8818

From: Mitschele.Becky@epamail.epa.gov [Mitschele.Becky@epamail.epa.gov]
Sent: Friday, December 28, 2012 1:42 PM
To: Devine, Jon; Karen Steuer
Subject: Meeting requested to discuss 12/20 letter in response to CAFO FOIA

Hi Jon and Karen,

I would like to set up another quick conference call to discuss the CAFO FOIA. In addition to myself and George Utting, Rural Branch Acting Chief, Deborah Nagle, our Division Director, will be on the call. We would like to discuss the site-specific CAFO records on this call.

Is there a good time that works for both of you? Deborah currently has open the following times:

1/2/13 after 3 pm EST
1/3/13 After 5 pm
1/7 or 1/9 after 3 pm

Thanks,
Becky Mitschele
Water Permits Division, OWM
U.S. Environmental Protection Agency
Tel: 202.564.6418

Yager, Scott

From: Devine, Jon [jdevine@nrdc.org]
Sent: Saturday, May 18, 2013 11:02 AM
To: Mitschele, Becky
Subject: RE: Mtg next week - RE: Amended FOIA Response #2013-001516

Thanks, Becky. Ordinarily, I would prefer the in-person approach, but I need to head for home promptly at 4:30, so I can ferry my son to a baseball game, so I'll plan to do it by phone.

Jon Devine
Senior Attorney, Water Program
Natural Resources Defense Council
jdevine@nrdc.org
(202) 289-2361 (phone)
(202) 289-1060 (fax)

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-----Original Message-----

From: Mitschele, Becky [<mailto:Mitschele.Becky@epa.gov>]
Sent: Friday, May 17, 2013 11:26 AM
To: Devine, Jon
Subject: Mtg next week - RE: Amended FOIA Response #2013-001516

Also, Jon, you are welcome to come down in person for the meeting with Ellen next week. I can sign you in. I understand that Eve will be dialing in on the conference line so we will have that open regardless.

Thanks,
Becky Mitschele
202-564-6418

-----Original Message-----

From: Devine, Jon [<mailto:jdevine@nrdc.org>]
Sent: Friday, May 17, 2013 10:47 AM
To: Mitschele, Becky
Subject: Re: Amended FOIA Response #2013-001516

Hi Becky-
I just received this. Is this changed?
Jon

Sent from my iPhone

On May 17, 2013, at 9:39 AM, "mitschele.becky@epa.gov" <mitschele.becky@epa.gov> wrote:

> 05/17/2013 09:37 AM

> FOIA Request: EPA-HQ-2013-001516

> <Steuer.pdf>

> <Devine.pdf>

Yager, Scott

From: Devine, Jon [mailto:jon@devine.org]
Sent: Sunday, May 18, 2013 7:02 AM
To: Mitchell, Becky
Subject: RE: Mtg next week - RE: Amended FOIA Response #2013-001516

Thanks, Becky. Originally, I would prefer the in-person approach, but I need to head for home promptly at 4:30, so I can
ferry my son to a baseball game, so I'll plan to do it by phone.

Jon Devine
Senior Attorney, Water Program
Natural Resources Defense Council
[mailto:jon@devine.org]
(202) 288-1261 (phone)
(202) 288-1060 (fax)

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intended only for the use of the individual or entity to which it is addressed and may contain information that is
privileged, confidential, and exempt from disclosure under applicable law. If you are not the intended recipient of this
message, you are hereby notified that any dissemination, distribution, or copying of this communication or other use of
a transmission received in error is strictly prohibited. If you have received this transmission in error, please notify me
immediately at the above telephone number.

-----Original Message-----
From: Mitchell, Becky [mailto:Becky@nrdc.org]
Sent: Friday, May 17, 2013 11:26 AM
To: Devine, Jon
Subject: Mtg next week - RE: Amended FOIA Response #2013-001516

Also, Jon, you are welcome to come down in person for the meeting with Ellen next week. I can sign you in. I
understand that Eve will be dialing in on the conference line so we will have that open regardless.

Thanks,
Becky Mitchell
202-264-0418

-----Original Message-----
From: Devine, Jon [mailto:jon@devine.org]
Sent: Friday, May 17, 2013 10:47 AM
To: Mitchell, Becky
Subject: Re: Amended FOIA Response #2013-001516

Hi Becky,
I just received that is this changed?
Jon

Sent from my phone

On May 17, 2013, at 9:10 AM, "Becky Mitchell" <Becky@nrdc.org> wrote:

> 05/17/2013 09:17 AM

Yager, Scott

From: Devine, Jon [jdevine@nrdc.org]
Sent: Wednesday, May 01, 2013 10:24 AM
To: Kupchan, Simma
Cc: Mitschele, Becky
Subject: RE: NRDC response to EPA 4/4/13 request re: CAFO FOIA request

Great. Yes, that's the best number.

Jon Devine
Senior Attorney, Water Program
Natural Resources Defense Council
jdevine@nrdc.org
(202) 289-2361 (phone)
(202) 289-1060 (fax)
Admitted in Massachusetts and the District of Columbia only

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From: Kupchan, Simma [<mailto:Kupchan.Simma@epa.gov>]
Sent: Wednesday, May 01, 2013 10:21 AM
To: Devine, Jon
Cc: Mitschele, Becky
Subject: RE: NRDC response to EPA 4/4/13 request re: CAFO FOIA request

Jon,

Ellen will plan to call you at 4 pm on Monday, May 20. Should she use the number in your signature line, below? Thank you for making yourself available.

Simma Kupchan
U.S. EPA Office of General Counsel
Water Law Office
202-564-3105

From: Devine, Jon [<mailto:jdevine@nrdc.org>]
Sent: Tuesday, April 30, 2013 4:25 PM
To: Kupchan, Simma
Cc: Mitschele, Becky
Subject: RE: NRDC response to EPA 4/4/13 request re: CAFO FOIA request

Either of those work for me.

Jon Devine
Senior Attorney, Water Program
Natural Resources Defense Council
jdevine@nrdc.org
(202) 289-2361 (phone)
(202) 289-1060 (fax)
Admitted in Massachusetts and the District of Columbia only

PRIVILEGE AND CONFIDENTIALITY NOTICE

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If you are not the intended recipient of this message, you are hereby notified that any dissemination, distribution, or copying of this communication or other use of a transmission received in error is strictly prohibited. If you have received this transmission in error, please notify me immediately at the above telephone number.

From: Kupchan, Simma [mailto:Kupchan.Simma@epa.gov]
Sent: Tuesday, April 30, 2013 4:16 PM
To: Devine, Jon
Cc: Mitschele, Becky
Subject: RE: NRDC response to EPA 4/4/13 request re: CAFO FOIA request

Jon,

Ellen Gilinsky wanted to know whether you might be free to discuss the question in your response at the following dates/times:

Monday, May 20, at 4 pm, or Tuesday, May 21, any time between 9-11 am.

Please let me know whether a call at one of these dates/times might work for you. Thank you.

Simma Kupchan
U.S. EPA Office of General Counsel
Water Law Office
202-564-3105

From: Devine, Jon [mailto:jdevine@nrdc.org]
Sent: Tuesday, April 09, 2013 4:07 PM
To: Mitschele, Becky; Gilinsky, Ellen; Kupchan, Simma; Stoner, Nancy
Cc: Althouse, Claire; Karen Steuer (ksteuer@pewtrusts.org)
Subject: NRDC response to EPA 4/4/13 request re: CAFO FOIA request

Please see attached. Please feel free to contact me with any questions you might have. We will be sending a hard copy of this letter and the disk via FedEx.

Best,
Jon

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Yager, Scott

From: Devine, Jon [jdevine@nrdc.org]
Sent: Tuesday, April 30, 2013 4:25 PM
To: Kupchan, Simma
Cc: Mitschele, Becky
Subject: RE: NRDC response to EPA 4/4/13 request re: CAFO FOIA request

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From: Kupchan, Simma [<mailto:Kupchan.Simma@epa.gov>]
Sent: Tuesday, April 30, 2013 4:16 PM
To: Devine, Jon
Cc: Mitschele, Becky
Subject: RE: NRDC response to EPA 4/4/13 request re: CAFO FOIA request

Jon,

Ellen Gilinsky wanted to know whether you might be free to discuss the question in your response at the following dates/times:

Monday, May 20, at 4 pm, or Tuesday, May 21, any time between 9-11 am.

Please let me know whether a call at one of these dates/times might work for you. Thank you.

Simma Kupchan
U.S. EPA Office of General Counsel
Water Law Office
202-564-3105

From: Devine, Jon [<mailto:jdevine@nrdc.org>]
Sent: Tuesday, April 09, 2013 4:07 PM
To: Mitschele, Becky; Gilinsky, Ellen; Kupchan, Simma; Stoner, Nancy
Cc: Althouse, Claire; Karen Steuer (ksteuer@pewtrusts.org)
Subject: NRDC response to EPA 4/4/13 request re: CAFO FOIA request

Please see attached. Please feel free to contact me with any questions you might have. We will be sending a hard copy of this letter and the disk via FedEx.

Best,
Jon

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Yager, Scott
From: Devine, Jon [mailto:jdevine@nrdc.org]
Sent: Tuesday, April 30, 2013 4:25 PM
To: Kupchan, Simms
Cc: Mitchell, Becky
Subject: RE: NRDC response to EPA 4/4/13 request re: CARO FOIA request

The message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If you are not the intended recipient of this message, you are hereby notified that any dissemination, distribution, or copying of this communication or other use of a transmission received in error is strictly prohibited. If you have received this transmission in error, please notify me immediately at the above telephone number.

From: Kupchan, Simms [mailto:Kupchan.Simms@epa.gov]
Sent: Tuesday, April 30, 2013 4:16 PM
To: Devine, Jon
Cc: Mitchell, Becky
Subject: RE: NRDC response to EPA 4/4/13 request re: CARO FOIA request

Jon,

Ellen Glinesky wanted to know whether you might be free to discuss the question in your response at the following date/time:

Monday, May 20, at 4 pm, or Tuesday, May 21, any time between 9-11 am.

Please let me know whether a call at one of these date/times might work for you. Thank you.

Simms Kupchan
U.S. EPA Office of General Counsel
Water Law Office
202-564-3105

From: Devine, Jon [mailto:jdevine@nrdc.org]
Sent: Tuesday, April 30, 2013 4:07 PM
To: Mitchell, Becky; Glinesky, Ellen; Kupchan, Simms; Stoner, Nancy
Cc: Altshuler, Gail; Karen Stoner [mailto:karen.stoner@epa.gov]
Subject: NRDC response to EPA 4/4/13 request re: CARO FOIA request

Please see attached. Please feel free to contact me with any questions you might have. We will be sending a hard copy of this letter and the disk via FedEx.

From: "Karen Steuer" <ksteuer@pewtrusts.org>
To: <Mitschele.Becky@epamail.epa.gov>
Sent: Thursday, January 31, 2013 5:06 PM
Subject: RE: Partial Denial Letter - FOIA Interim Response #2 - All Responsive Documents Except Email Records

Thank you Becky.

Karen Steuer

Director, Government Relations
Pew Environment Group
901 E Street NW, Washington D.C.
(202) 887-8818
ksteuer@pewtrusts.org

From: Mitschele.Becky@epamail.epa.gov [mailto:Mitschele.Becky@epamail.epa.gov]
Sent: Thursday, January 31, 2013 4:57 PM
To: Julie Janovsky; jdevine@nrdc.org; calthouse@nrdc.org; Karen Steuer
Cc: Yager.Scott@epamail.epa.gov; Kupchan.Simma@epamail.epa.gov; Utting.George@epamail.epa.gov
Subject: Partial Denial Letter - FOIA Interim Response #2 - All Responsive Documents Except Email Records

Please find attached a letter in response to your FOIA Request as well as a list of documents withheld. You will be getting a CD with electronic records of all releasable documents, and I will be uploading these documents into FOIAonline. We have mailed the CD and the attached letter to both NRDC and Pew.

We are working on compiling the email records per our previous email exchanges. Thank you again for working with us as we transmit all responsive email records to you in a few weeks. If you have any questions, please feel free to call.

(See attached file: Partial Denial Letter to NRDC_PEW.pdf)

(See attached file: Spreadsheet with the documents withheld.xlsx)

Thanks,
Becky Mitschele
Water Permits Division, OWM
U.S. Environmental Protection Agency
Tel: 202.564.6418

From: "Althouse, Claire" <calthouse@nrdc.org>
To: <Mitschele.Becky@epamail.epa.gov>
Cc: <Kupchan.Simma@epamail.epa.gov>; <Yager.Scott@epamail.epa.gov>; <Utting.George@epamail.epa.gov>; <Webb.Adelaide@epamail.epa.gov>; <Jones-Coleman.Diane@epamail.epa.gov>; "Devine, Jon" <jdevine@nrdc.org>; <jjanovsky@pewtrusts.org>; <ksteuer@pewtrusts.org>
Sent: Friday, December 21, 2012 9:35 AM
Attach: PewNRDCCAFOFOIA- Response to EPA Request for Additional Time- 12-20-12.pdf; Appendix A- Pew-NRDC CAFO FOIA 10-24-12 copy.pdf
Subject: RE: Partial Response to FOIA EPA-HQ-2013-001516
 Good morning Becky,

Attached, please find Pew and NRDC's response to your request for an extended timeframe to reply to our FOIA request.

Sincerely,
 Claire Althouse

From: Mitschele.Becky@epamail.epa.gov [Mitschele.Becky@epamail.epa.gov]
 Sent: Tuesday, December 18, 2012 10:32 AM
 To: jjanovsky@pewtrusts.org; Devine, Jon
 Cc: Althouse, Claire; Kupchan.Simma@epamail.epa.gov; Yager.Scott@epamail.epa.gov; Utting.George@epamail.epa.gov; Webb.Adelaide@epamail.epa.gov; Jones-Coleman.Diane@epamail.epa.gov
 Subject: Partial Response to FOIA EPA-HQ-2013-001516

Hello Jon and Julie,

We have mailed a partial response to the FOIA requesting copies of records related to the withdrawal of the proposed CAFO Reporting Rule.

Please find attached the cover letter that will be enclosed with the CD that we are mailing today. Once you have had a chance to review the documents, we can set up a meeting to discuss next steps. Please let me know what would be a good day and time for you all.

(See attached file: Interim response cover letter to NRDC and Pew.pdf)

Thanks,
 Becky Mitschele
 Water Permits Division, OWM
 U.S. Environmental Protection Agency
 Tel: 202.564.6418



THE
PEW
CHARITABLE TRUSTS

October 24, 2012

Via Regular Mail and Electronic Mail to:

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
E-mail: hq.foia@epa.gov

**Re: Freedom of Information Act Request for Records Related to EPA's Ability to
Protect the Public from Concentrated Animal Feeding Operations' Pollution**

To Whom It May Concern:

On behalf of the Natural Resources Defense Council ("NRDC") and the Pew Charitable Trusts, we write to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"),¹ and the Environmental Protection Agency ("EPA") FOIA regulations.²

NRDC is comprised of more than 1.3 million members and online activists and over 350 lawyers, scientists, and advocates who are committed to protecting our natural resources for health and future generations. This includes protecting our nation's water supply from pollution caused by animal agriculture.

The Pew Charitable Trusts' Campaign to Reform Industrial Animal Agriculture is dedicated to advancing pollution control policies to mitigate waste from animal agriculture and create a new system that is less damaging to the environment, rural communities and human health.

¹ 5 U.S.C. § 552.

² 40 C.F.R. 2.100 ff.

I. Description of Records Sought

NRDC and the Pew Charitable Trusts ask that EPA please produce all records³ in EPA's possession, custody or control relating to EPA's withdrawal of the proposed National Pollutant Discharge Elimination System ("NPDES") Concentrated Animal Feeding Operation ("CAFO") Reporting Rule ("Reporting Rule").⁴

These records should include, without limitation:

1. Any records pertaining to the Reporting Rule that are not contained in the public docket for that rule that were submitted to EPA by: The American Farm Bureau Federation, The National Pork Producers Council, The National Cattlemen's Beef Association, The United Egg Producers, The U.S. Poultry & Egg Association, The National Council of Farmer Cooperatives, The National Milk Producers Federation, The National Chicken Council, the National Turkey Federation, The National Corn Growers Association, or any other agricultural trade association.
2. Any records providing factual information concerning the completeness, accuracy, and public accessibility of states' CAFO information in the following areas:
 - a. The legal name of the owner of the CAFO or an authorized representative, their mailing address, email address, and primary telephone number,
 - b. The legal name and address of the CAFO owner/operator, if the name and address of an authorized representative is provided above,
 - c. The location of the CAFO's production area, identified by latitude and longitude and street address,
 - d. If the owner or operator has NPDES permit coverage, the date of issuance of coverage under the NPDES permit, and the permit number,
 - e. For the previous 12-month period, identification of each animal type confined either in open confinement including partially covered area, or housed totally under roof at the CAFO for 45 days or more, and the maximum number of each animal type confined at the CAFO for 45 days or more,
 - f. Where the owner or operator land applies manure, litter, and process wastewater, the total number of acres under the control of the owner or operator available for land application,
 - g. If the CAFO is a contract operation, the name and address of the integrator,

³ The term "records" is used herein to mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) including, but not limited to, correspondence, minutes of meetings, memoranda, notes, e-mails, notices, facsimiles, charts, tables, presentations, orders and filings.

⁴ National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431 (Oct. 21, 2011) (Docket No. EPA-HQ-OW-2011-0188) [hereinafter *CAFO Reporting Rule*].

- h. Type and capacity of manure storage used at the CAFO,
 - i. Quantity of manure, process wastewater, and litter generated annually by the CAFO,
 - j. If the CAFO land-applies, whether it implements a nutrient management plan for land application,
 - k. If the CAFO land-applies, whether it employs nutrient management practices and keeps records on site consistent with 40 CFR 122.23(e),
 - l. If the CAFO does not land apply, alternative uses of manure, litter and/or wastewater, and
 - m. Whether the CAFO transfers manure off site, and if so, the quantity transferred to recipient(s) of transferred manure.
3. Any records that provide any of items 2.a-m, above, for any CAFO in the U.S.

II. Request for Fee Waiver

NRDC and the Pew Charitable Trusts request that EPA waive the fee that it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be furnished without any charge or at a reduced charge if A) “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government,” and B) “is not primarily in the commercial interest of the requester.”⁵ The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as a “representative of the news media” entitled to a reduction of fees under FOIA.⁶

A. Disclosure is in the Public Interest and would Contribute Significantly to Public Understanding of the Operations of the Government

FOIA dictates that a fee waiver should be granted when a disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government.”⁷ The records described above shed light on a matter of considerable public interest and concern: the extent to which EPA has the capacity to effectively mitigate water pollution from CAFOs.

As EPA pointed out in the proposed Reporting Rule, “pollutants from manure, litter, and process wastewater can affect human health and the environment.”⁸ EPA noted that “despite more than 35 years of regulating CAFOS, reports of water quality impacts from large animal feeding

⁵ 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 CFR 2.107(d).

⁷ 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

⁸ CAFO Reporting Rule, *supra* note 4, at 65,433.

operations persist.”⁹ Pollutants commonly found in CAFO waste include nutrients, pathogens, heavy metals, and pharmaceuticals.¹⁰ These pollutants cause toxic algal blooms, human disease, and human reproductive problems.¹¹ It is of great public concern that waste containing these pollutants is effectively managed and contamination of water resources is avoided.

The Government Accountability Office recommended in a 2008 report to Congress that EPA “should complete the Agency’s effort to develop a national inventory of permitted CAFOs” because “EPA has neither the information it needs to assess the extent to which CAFOs may be contributing to water pollution, nor the information it needs to ensure compliance with the Clean Water Act.”¹² EPA withdrew the Reporting Rule, which would have gathered information EPA needs to perform its duty of protecting public health and water quality. It is therefore in the public interest to determine what “operations or activities” the EPA plans to use to deal with the staggering lack of information about CAFOs and the persistent pollution affiliated with these facilities.

The tailored request in this letter seeks disclosure of important records concerning EPA’s activities that will contribute meaningfully and significantly to public understanding of CAFO pollution. Disclosure of these records will contribute “significantly” to public understanding because NRDC and the Pew Charitable Trusts will disseminate summary and analysis of any newsworthy information conveyed in the requested records.

As a not for profit organization, the Pew Charitable Trusts is well-equipped to analyze and disseminate the requested information, and may use this information to contribute to the public’s understanding of the EPA’s withdrawal of the proposed NPDES CAFO Reporting Rule. The Pew Charitable Trusts could disseminate that information in a number of ways including through the Pew Charitable Trusts’ website, <http://www.pewtrusts.org>, Pew Environment Group’s website, <http://www.pewenvironment.org>, and its publication *The Latest*, which has a circulation of nearly 120,000 people. In addition, it could distribute the information through the state and national media by way of press releases or other media for general public consumption.

NRDC publishes information in its magazine, *OnEarth*, which is distributed to over 150,000 subscribers, for sale to newsstands and bookstores, and free of charge at <http://www.nrdc.org/onearth>. NRDC also has the ability to disseminate information on CAFO pollution through its website, <http://www.nrdc.org>, which is updated daily and draws approximately 2.5 million page views and 700,000 visits per month; its *Nature’s Voice* newsletter on current environmental issues, distributed five times a year to NRDC’s

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² U.S. Gov’t Accountability Office, *Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality*, GAO-08-944 5 (2008), page 48.

approximately 650,000 members and online at <http://www.nrdc.org/naturesvoice/>, and other newsletters and alerts. NRDC's *Earth Action* email list has more than 165,000 subscribers who receive biweekly information on urgent environmental issues. This information is also made available through NRDC's online Action Center at <http://www.nrdc.org/legislation/legwatch.asp>. *This Green Life* is an electronic newsletter on environmentally sustainable living distributed by email to 55,000 subscribers and made available online at <http://www.nrdc.org/thisgreenlife/>. NRDC issues press releases; participates in press conferences and interviews with reporters and editorial writers; and has over twenty staff members dedicated to communications work.¹³ Finally, NRDC employees provide Congressional testimony, appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books.¹⁴

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

1. NRDC obtained through a court-enforced FOIA request records of the operations of Bush Administration's Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at <http://www.nrdc.org/air/energy/taskforce/tfinx.asp>. NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention.¹⁵
2. NRDC obtained through a FOIA request a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to

¹³ See "Communications" staff list at <http://www.nrdc.org/about/staff.asp>.

¹⁴ See, e.g., Tammy Weber, *EPA Can't Regulate Livestock Farms it Can't Find*, Huffington Post, http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livestock_n_1732414.html (Aug. 2, 2012) (quoting NRDC Senior Attorney Jon Devine); Kristin Eberhard and Evan Gillespie, "How LADWP can do right by Angelenos," Op-Ed, L.A. Times (Sept. 11, 2012) (co-authored by NRDC Western Energy and Climate Program Legal Director Kristin Eberhard); Alice Park, "Waste Not," Time Magazine (Sept. 10, 2012) (quoting NRDC Senior Scientist Allen Hershkowitz); Steve Scher, "Food: Why Americans Waste So Much and Ways to Stop," KOUW (Seattle Public Radio), Aug. 30, 2012 (featuring NRDC Scientist Dana Gunders); "Weighing Benefits and Pitfalls of Increased Oil and Gas Production in the U.S.," PBS NewsHour, Aug. 10, 2012 (featuring NRDC Senior Attorney Kate Sinding); "Clean Air in California: What's it Going to Take?" 2012 Environmental Law Conference at Yosemite, Oct. 28, 2012 (featuring NRDC Attorney Adrian Martinez).

¹⁵ See, e.g., Elizabeth Shogren, *Bush Gets One-Two Punch on Energy*, L.A. Times (Mar. 28, 2002), at A22; Bennett Roth, *Houston Energy-Drilling Firm Appears in Documents from Energy Department*, Houston Chronicle (Apr. 12, 2002).

help inform the public about what may have been behind the decision by the Bush Administration to replace Dr. Watson.¹⁶

3. NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website,¹⁷ on the impacts of military sonar and other industrial noise pollution on marine life.¹⁸

Disclosure of the requested documents is "likely to contribute significantly to public understanding" of EPA's activities concerning CAFO pollution¹⁹ because NRDC intends to disseminate any newsworthy information in the released records, and its analysis of such records, to its member base and to the broader public, through one or more of the many communications channels referenced above. As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

B. NRDC and the Pew Charitable Trusts have no Commercial Interest that would be Furthered by the Requested Information

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request²⁰ because "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"²¹ NRDC and the Pew Charitable Trusts are not-for-profit organizations and, as such, have no commercial interest.

NRDC's and the Pew Charitable Trusts' primary interest in obtaining the above records is to serve the public by disclosing presently non-public information about EPA's ability to protect the public from CAFO pollution. As previously discussed, CAFOs are a significant source of water pollution, and waste from CAFOs contains substances that are hazardous to humans and the environment. Because CAFOs are potentially so harmful to human health and natural places, it is in the public interest to examine how EPA plans to protect against the harmful effects of CAFO pollution.

¹⁶ See NRDC Press Release and Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," (Apr. 3, 2002); Elizabeth Shogren, *Charges Fly Over Science Panel Pick*, L.A. Times (Apr. 4, 2002).

¹⁷ See <http://www.nrdc.org/wildlife/marine/sound/contents.asp>.

¹⁸ See NRDC, *Sounding the Depths II* (Nov. 2005) (update to a 1999 report). Since the report's publication, the sonar issue has continued to attract widespread public attention. See, e.g., D. Fleshler, "Navy testing could devastate whales and dolphins, groups say," Ft. Lauderdale Sun Sentinel, July 13, 2012.

¹⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

²⁰ 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l)(3).

²¹ *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted).

C. NRDC is a Media Requester

Even if EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA.²² As described previously in this request, NRDC publishes a quarterly magazine, *OnEarth*, which has more than 150,000 subscribers and is available at newsstands and bookstores; publishes a periodic newsletter for its more than 650,000 members nationally; issues regular electronic newsletters, action alerts, public reports and analyses; and maintains a free online library of reports and analyses. These publications routinely include information about current events of interest to the readership and the public. NRDC staff members are also regular contributors to numerous periodicals, books, and the NRDC Switchboard blog, <http://www.switchboard.nrdc.org/>; television, radio, and web programs; and hearings and conferences. CAFO pollution specifically has been featured in some of NRDC's media outlets.²³ As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of NRDC's publications or other suitable channels.

III. Willingness to Pay Fees Under Protest

Please provide the records above irrespective of the status and outcome of your evaluation of NRDC's and the Pew Charitable Trusts' fee category assertion and fee waiver request. In order to prevent delay in EPA's provision of the requested records, NRDC and the Pew Charitable Trusts state that they will, if necessary and under protest, pay fees in accordance with 40 CFR 2.107. Please consult with me, however, before undertaking any action that would cause the fee to exceed \$500. Such payment will not constitute any waiver of NRDC's and the Pew Charitable Trusts' right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

²² 5 U.S.C. § 552(a)(4)(A)(ii); 40 CFR 2.107(d).

²³ See, e.g., Posting of Jon Devine to NRDC Switchboard Blog, *EPA Chickens Out by Dropping Industrial Livestock Information Collection Effort*, (July 24, 2012), http://switchboard.nrdc.org/blogs/jdevine/epa_chickens_out_by_dropping_i.html; Dan Rosen, *Cow Woes*, *OnEarth Magazine* (Aug. 26, 2012), available at <http://www.onearth.org/article/cow-woes>.

IV. Conclusion

We trust that, in responding to this request, EPA will comply with all relevant deadlines and other obligations set forth in FOIA and EPA's regulations.²⁴

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Jon Devine at jdevine@nrdc.org, or mail them to:

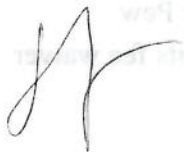
Jon Devine
NRDC
1152 15th Street NW, Suite 300
Washington, DC 20005

Please produce records on a rolling basis; at no point should EPA's search for or deliberations concerning certain records delay the production of others that EPA has already retrieved and is obliged to produce.

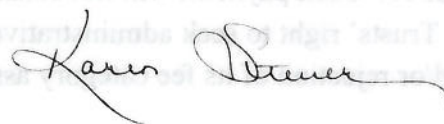
In the event that EPA concludes that some of the records requested above may already be publicly available, we will be happy to discuss those conclusions in an effort to narrow the scope of this request.

Thank you for your prompt attention to this request.

Sincerely,



Jon P. Devine, Jr.
Senior Attorney
Natural Resources Defense Council
202-289-6868
jdevine@nrdc.org



Karen Steuer
Director, Government Relations
Pew Environment Group
202-887-8818
ksteuer@pewtrusts.org

²⁴ See 5 U.S.C. § 552; 40 CFR 2.100 ff.



THE
PEW
CHARITABLE TRUSTS

December 21, 2012

Via Electronic Mail

Becky Mitschele
Water Permits Division, OWM
U.S. Environmental Protection Agency
Mitschele.Becky@epamail.epa.gov

Re: Environmental Protection Agency request for additional time to respond to Freedom of Information Act inquiry

Dear Ms. Mitschele,

NRDC and the Pew Environment Group have reviewed your request to extend the Environmental Protection Agency's (EPA) deadline for responding to our Freedom of Information Act (FOIA) request dated October 24, 2012.¹ We agree to wait until January 31, 2013, to receive a portion of the information we requested.

As you are aware, FOIA sets forth a 20-day timeframe for response;² if unusual circumstances exist, EPA may request an extension of 10 working days, or ask the requester to limit the scope of the request.³ Twenty working days for responding to our request expired on November 21, 2012, at which time we had not heard from EPA regarding our request. The additional 10 days we could have potentially granted had we talked with EPA would have expired December 7, 2012. On December 17, 2012, EPA requested to extend the timeframe for response until January 31, 2013.

We agree to partially grant EPA's request for an extended timeframe for response. We agree to extend the timeframe for response with respect to our third request in the attached letter⁴ until January 31, 2013. It is our understanding of this agreement that EPA will use the extended time to prepare the requested information. By January 31, 2013, we expect to receive all records responsive to our request.

¹ Appendix A, attached.

² 5 U.S.C. § 552(a)(6); 40 C.F.R. 2.104.

³ Id.

⁴ Appendix A, page 3.

We do not agree to extend the timeframe for our first and second requests. We request that EPA immediately provide any records that are responsive to our first and second requests in the attached letter.⁵

Thank you for compiling the requested information for us.

Sincerely,



Jon P. Devine, Jr.
Senior Attorney
Natural Resources Defense Council
jdevine@nrdc.org



Karen Steuer
Director of Government Relations,
Pew Charitable Trusts
ksteuer@pewtrusts.org

⁵ Appendix A, page 2.

From: <Mitschele.Bekky@epamail.epa.gov>
To: "Althouse, Claire" <calthouse@nrdc.org>
Cc: <jjanovsky@pewtrusts.org>
Sent: Monday, December 17, 2012 6:06 PM
Subject: Re: Sending responsive records

To: "Althouse, Claire" <calthouse@nrdc.org>

Cc: "jjanovsky@pewtrusts.org" <jjanovsky@pewtrusts.org>

Thanks! I got the right addresses for both NRDC and Pew now.

Happy Holidays!

Becky Mitschele
Water Permits Division, OWM
U.S. Environmental Protection Agency
Tel: 202.564.6418

▼ "Althouse, Claire" ---12/17/2012 05:47:32 PM---Hi Becky, Thanks for reaching out about where to send the CDs with responsive records. Please send

From: "Althouse, Claire" <calthouse@nrdc.org>
To: Becky Mitschele/DC/USEPA/US@EPA
Cc: "jjanovsky@pewtrusts.org" <jjanovsky@pewtrusts.org>
Date: 12/17/2012 05:47 PM
Subject: Sending responsive records

Hi Becky,

Thanks for reaching out about where to send the CDs with responsive records. Please send NRDC's copy to:

Jon Devine
1152 15th Street NW, Suite 300
Washington, DC 20005

I cc-ed Julie Janovsky at Pew so that she can tell you where to send Pew's copy.

Please let me know if there's anything further I can do to assist you.

Thanks,
Claire

Yager, Scott

From: Karen Steuer [ksteuer@pewtrusts.org]
Sent: Thursday, January 31, 2013 5:07 PM
To: Mitschele, Becky
Subject: RE: Partial Denial Letter - FOIA Interim Response #2 - All Responsive Documents Except Email Records

Thank you Becky.

Karen Steuer

Director, Government Relations
Pew Environment Group
901 E Street NW, Washington D.C.
(202) 887-8818
ksteuer@pewtrusts.org

From: Mitschele.Becky@epamail.epa.gov [mailto:Mitschele.Becky@epamail.epa.gov]
Sent: Thursday, January 31, 2013 4:57 PM
To: Julie Janovsky; jdevine@nrdc.org; calthouse@nrdc.org; Karen Steuer
Cc: Yager.Scott@epamail.epa.gov; Kupchan.Simma@epamail.epa.gov; Utting.George@epamail.epa.gov
Subject: Partial Denial Letter - FOIA Interim Response #2 - All Responsive Documents Except Email Records

Please find attached a letter in response to your FOIA Request as well as a list of documents withheld. You will be getting a CD with electronic records of all releasable documents, and I will be uploading these documents into FOIAonline. We have mailed the CD and the attached letter to both NRDC and Pew.

We are working on compiling the email records per our previous email exchanges. Thank you again for working with us as we transmit all responsive email records to you in a few weeks. If you have any questions, please feel free to call.

(See attached file: Partial Denial Letter to NRDC_PEW.pdf)

(See attached file: Spreadsheet with the documents withheld.xlsx)

Thanks,
Becky Mitschele
Water Permits Division, OWM
U.S. Environmental Protection Agency
Tel: 202.564.6418



NATURAL RESOURCES DEFENSE COUNCIL

April 9, 2013

Becky Mitschele
U.S. Environmental Protection Agency
MC 4203M
1200 Pennsylvania Avenue
Washington DC, 20460
Mitschele.Becky@epa.gov

Dear Ms. Mitschele:

In response to the Environmental Protection Agency's (EPA's) April 4, 2013, request, the Natural Resources Defense Council (NRDC) is returning the disk provided to us on January 31, 2013, pursuant to a Freedom of Information Act (FOIA) request.¹ We also deleted from our computer system all electronic copies of the documents contained on that disk. As evidenced by our cooperation with EPA's request and our willingness to refrain from using these materials during EPA's extended review of them, NRDC has no interest in personal phone numbers, email addresses, or other private information about individuals. Instead, as explained in our original FOIA request, we are interested in "important records concerning EPA's activities that will contribute meaningfully and significantly to public understanding of CAFO pollution."²

To effectuate the goal described in our original request, we would like further clarification of the basis for withholding non-personal information contained in EPA's records, which fall into the first four categories of the itemized list of withheld material that you attached to your April 4, 2013 letter.³ For example, EPA notes that the agency withheld "documents that refer or relate to...EPA's progress on obtaining existing CAFO information."⁴ This description suggests that the agency is withholding factual, not deliberative, material. Please provide a more complete description of the

¹ EPA's April 4, 2013 letter references a February 4, 2013 response. However, NRDC did not receive any disks, letters, or responses on February 4, 2013, so we are returning the disk we received on January 31, 2013 containing the documents described in the remainder of your April 4, 2013 letter.

² Letter from Jon P. Devine, Jr., Senior Attorney, NRDC, and Karen Steuer, Director of Government Relations, Pew Charitable Trusts, to the National Freedom Information Officer, U.S. Environmental Protection Agency (October 24, 2012).

³ Letter from Nancy Stoner, Acting Assistant Administrator, U.S. Environmental Protection Agency Office of Water, to Jon Devine, Senior Attorney, NRDC (April 4, 2013).

⁴ Id.

administrative, non-facility-specific records EPA withheld, and the basis for withholding those administrative records. In view of President Obama's memorandum to agency heads insisting on "a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government,"⁵ such an explanation is imperative. In the meantime, we reserve our rights to appeal EPA's refusal to disclose those non-privacy related materials. Thank you for your attention to our request for further information.

Sincerely,



Jon P. Devine, Jr.

Senior Attorney, NRDC

1152 15th Street NW, Suite 300

Washington, DC 20005

202-289-6868

jdevine@nrdc.org

Enclosure

cc: Nancy Stoner, EPA OW
Ellen Gilinsky, EPA OW
Karen Steuer, Pew Charitable Trusts

⁵ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683 (Jan. 21, 2009).

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Please let me know if there's anything further I can do to assist you.

Thanks,
Claire

